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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

GEROLD A. SEBULSKY

Petitioner,

vs.

SONNY RICHARDSON and EDWARD BLEVINS

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Where a law enforcement official uses or approves the use of a weapon, like dogs, to attack and seriously injure people, and the official knows or should know that such use violates well-established standards for the use of force, should the official be entitled to qualified immunity?

LIST OF PARTIES

Petitioner Gerold A. Sebulsky was plaintiff and respondent in the court below. Respondents Sonny Richardson and Edward Blevins were the defendants and appellants in the court below.

City of Riverside was a defendant in the case in the U.S. District Court, Central District; but was not a defendant nor an appellant in the court below, and is not a defendant nor a respondent in this court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Proceedings Below 3

B. Statement Of Facts 3

1. Introduction. 3

2. The Dog Attack. 3

3. Mr. Sebulsky's Medical Treatment. . . 4

4. Mr. Sebulsky's Permanent Physical and Mental Injuries. 5

5. Defendants Used The Dog With Knowledge That The Dog Would Attack Mr. Sebulsky. 5

6. The Characteristics, Training and Use of Defendants' Police Dogs. ... 6

7. Medical Treatment Required for Police Dog Bite Victims. 7

8. It Does Not Serve Any Legitimate Police Purpose To Use Dogs To Attack People. 10

9. Richardson's Deliberate Indifference. 15

REASON FOR GRANTING THE WRIT 17

1. The Court Should Hold That Police Officials Who Knowingly Use Weapons, *i.e.*, Attack Dogs, To Injure People Are Not Entitled To Qualified Immunity Merely Because The Courts Have Not Previously Held That The Serious Injuries Which Police Officials Know Or Should Know The Dogs Inflict Are Serious Injuries. 17

SUMMARY OF ARGUMENT 17

ARGUMENT 18

II. IT WAS CLEARLY ESTABLISHED WHEN "DEADLY FORCE" MAY BE USED TO SEIZE A PERSON. 22

A. It Was Clearly Established That "Deadly Force" May Only Be Used Where There Is Probable Cause That The Suspect Presents An Immediate And Credible Threat Of Death Or Serious Injury. 22

B. It Was Clearly Established That "Deadly Force" Is Any Force Which Is Reasonably Capable Of Causing Death Or Serious Injury. 23

III. *ROBINETTE V. BARNES* DID NOT PERMIT USING ATTACK DOGS TRAINED TO INFLICT SERIOUS INJURIES. 25

IV. RICHARDSON, THE CHIEF OF POLICE, DOES NOT ENJOY IMMUNITY. 26

V. THE DOG HANDLER DOES NOT ENJOY IMMUNITY. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

*Kopf v. Wing 23

*Cal. Penal Code § 245(a)(1) 18

Anderson v. Creighton,
483 U.S. 635, 97 L. Ed. 2d 523, 107 S.Ct. 3034 (1987) 25

Brower v. County of Inyo,
489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) 16

Chew v. Gates,
27 F.3d 1432 (9th Cir. 1994) 15, 24

Graham v. Connor,
490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) 16, 17, 26

Hammer v. Gross,
932 F.2d 842 (9th Cir. 1991) 16, 18, 25

Hopkins v. Andaya,
958 F.2d 881 (9th Cir. 1992) 17, 25

Kennedy v. Los Angeles,
901 F.2d 702 (9th Cir. 1989) 19

Kerr v. City of West Palm Beach,
875 F.2d 1546 (11th Cir. 1989) 16, 23

Marley v. City of Allentown,
774 F. Supp. 343 (E.D. Penn. 1991) 16, 22, 24-26

Mathis v. Parks,
741 F. Supp. 567 (E.D.N.C. 1990) 22, 25

McDonald v. Haskins,
966 F.2d 292 (7th Cir. 1992) 26

Michael v. State,
160 Ga. App. 48, 286 S.E.2d 314 (1981) 23

Miller v. United States,
404 F.2d 611 (5th Cir. 1968) 20

Moran v. Davis,
18 Ga. 722 (1855) 20

O'Brien v. City of Palm Springs,
Central District No. SACV93-101 AHS (RWRx) 12

People v. Keenan,
227 Cal. App. 3d 26, 277 Cal. Rptr. 687 (1991) 19

People v. Nealis,
232 Cal. App. 3d Supp. 1, 283 Cal. Rptr. 376, (1991) 23, 26

People v. Newble,
120 Cal. App. 3d 444, 174 Cal. Rptr. 637, (1981) 19

People v. Page,
104 Cal. App. 3d 569, 163 Cal. Rptr. 839 (1980) 19

People v. Pullins,
95 Cal. App. 2d 902, 214 P.2d 436 (1950) 18

People v. Rivera,
8 Cal. App. 4th 1000, 10 Cal. Rptr. 2d 785 (1992) 24

People v. Wiley,
18 Cal. 3d 162, 133 Cal. Rptr. 135, 554 P.2d 881 (1976) 19

Pruitt v. City of Montgomery,
771 F.2d 1475 (11th Cir. 1985) 23

Robinette v. Barnes,
854 F.2d 909 (6th Cir. 1988) 16, 24, 26

Rochin v. California,
342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) 18

Rose v. City of Los Angeles,
814 F. Supp. 878 (C.D. Cal. 1993) 12, 24

Ryder v. City of Topeka,
814 F.2d 1412 (10th Cir. 1987) 22

Schmerber v. California,
384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) 18

State v. Bowers,
239 Kan. 417, 721 P.2d 268, (1986) 23

Street v. Parham,
929 F.2d 537 (10th Cir. 1991) 17, 25

Tennessee v. Garner,
471 U.S. 1, 85 L.Ed. 2d 1, 105 S.Ct. 1694 (1985) 11, 17, 18, 21, 22, 26

Ting v. United States,
927 F.2d 1504 (9th Cir. 1991) 21

United States v. Demery,
980 F.2d 1187 (8th Cir. 1992) 22

United States v. Harriss,
347 U.S. 612, 617, 74 S. Ct. 808 (1954) 26

United States v. Moore,
846 F.2d 1163 (8th Cir. 1988) 22, 23

United States v. Sanchez,
914 F.2d 1355 (9th Cir. 1990) 16, 22

Ward v. County of San Diego,
791 F.2d 1329 (9th Cir. 1986) 19

Winston v. Lee,
470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) 17-19

Constitutions, Statutes, Rules:

Cal. Penal Code § 190.2 (14) 20

Cal. Penal Code § 203 19

Cal. Penal Code § 205 18

Cal. Penal Code § 206 19

Cal. Penal Code § 206.1 20

Cal. Penal Code § 245(a)(2) 19

Title 18 U.S.C. § 111 22

Title 18 U.S.C. § 1114 22

Title 42 U.S.C. § 1983 3

Other:

ANNALS EMERGENCY MED.
Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites, Sept. 1990 9

Annot., 7 A.L.R.
4th 607 (1981) 22, 23

D. Reaver,
The Search & Bark vs. the Search & Bite Method of Deployment 6, 13

International Association of Chiefs of Police,
Training Key # 238, *Police Dogs* 20

J. Fyfe,
Administrative Intervention on Police Shooting Discretion: An Empirical Examination, 7 J. CRIM. JUST. 309 (1979) 12

MODEL PENAL CODE § 212.4(4) 22

MODEL PENAL CODE § 311.2 23

REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) 11

W. GELLER & M. SCOTT, DEADLY FORCE: WHAT WE KNOW (Police Executive Research Foundation 1992) 10, 23

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OCTOBER TERM 1994

GEROLD A. SEBULSKY

Petitioner,

vs.

SONNY RICHARDSON and EDWARD BLEVINS,

Respondents.

Petitioner Gerold A. Sebulsky respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on February 3, 1995.

OPINION BELOW

The opinion of the Court of Appeals was not reported. It appears in the Appendix hereto [hereinafter "Apx."], Appendix A. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on February 3, 1995. Apx. A-1. A timely petition for rehearing and suggestion for rehearing *en banc* was denied 3/6/95. Apx. B-1. This petition for certiorari was filed within 90 days of March 16, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings Below

Plaintiff Gerold Sebulsky filed a complaint against defendants alleging a cause of action under 42 U.S.C. § 1983. Defendants Sonny Richardson, the Riverside Police Chief, and Edward Blevins, a Riverside police dog handler, brought a motion for summary judgment which was denied. Claiming they are immune from suit, defendants appeal.

B. Statement Of Facts

1. Introduction.

The police tried to pull over 22-year-old Gerold Sebulsky allegedly because he was driving without his headlights on. Mr. Sebulsky sped away, stopped the vehicle, ran and hid. With Richardson's approval, Blevins, without warning that the dog might bite, sent a dog to find *and attack* Mr. Sebulsky. The dog attacked Mr. Sebulsky, biting him all over his body, inflicting very serious injuries which left Mr. Sebulsky with permanent scarring and physical and mental injuries. Photographs depicting a portion of Mr. Sebulsky's injuries are found at ASER (Appellee's Supplemental Excerpts of Record) 348-49.

2. The Dog Attack.

Mr. Sebulsky drove to where he had played as a boy, Sebulsky Deposition, ASER 594:21-25,[1] and hid in bushes. ASER 595:3-21. Mr. Sebulsky never heard any announcement that a police dog would be used. Had Mr. Sebulsky thought that the police would use a dog to attack him, he would have turned himself in. ASER 596:7-19; 598:11 - 599:14. When Mr.

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[1] Page citations to deposition or trial testimony refer to the ASER page number and not the deposition or trial transcript page number.

Sebulsky first saw the animal coming at him with its mouth open, ASER 597:8-12, he immediately tried to protect his head, ASER 599:18-22. He began screaming to call the dog off. ASER 604:3-9. When the dog bit Mr. Sebulsky on the arm, ASER 600:5-8, he tried to lie still, so as not to aggravate the dog, but the dog kept eating him. ASER 600:25 - 601:4. The dog bit Mr. Sebulsky in the leg, upper and lower left and right arms, back, and right shoulder blade. ASER 602:3 - 602A:25. The attack seemed like it lasted an hour but probably lasted only 45 seconds to a minute. ASER 603:1-5. Mr. Sebulsky crawled out of the bushes, ASER 603:6-16, and eventually managed to drag and carry the dog into the clear, ASER 604:10 - 605:11, where he dropped to the ground, the dog still biting him in the arm. Contrary to his counsel's assertion (AOB p. 6), Blevins did *not* call the dog off when he heard it make "contact" with Mr. Sebulsky. Instead, Blevins waited until Mr. Sebulsky came out of the bushes, the dog still biting him, before calling off the dog. Then, the police ordered Mr. Sebulsky to get up or they would sic the dog on him again. ASER 606:2 - 607:12. He got up and was placed in a police car. ASER 608:12-16.

The police did not have any information that Mr. Sebulsky was armed with any weapon. There is no indication in any of the police reports that the police believed that Mr. Sebulsky was armed. ASER 304-14.

The police did not warn Mr. Sebulsky that the dog might attack him. None of the police reports or declarations claim to have given a warning that the dog might bite.

3. Mr. Sebulsky's Medical Treatment.

The police transported Mr. Sebulsky to Riverside General Hospital, where he passed out. ASER 609:17-20. The next thing Mr. Sebulsky remembers is coming back from court a few days later, ASER 610:2 - 611:6, and learning that the bites to his left arm, right forearm, back, and the back of both his upper right and

left arms had become infected. ASER 611:7-14. When the nurse went to change the bandages, they stunk of infection. ASER 611:17-22. Mr. Sebulsky was readmitted to the hospital, where he remained for an additional three weeks. ASER 612:11-18. The hospital opened up the wounds and they shoved wet gauze in the wounds and every two to four hours they would come back and rip the infection out with the gauze and then shove more gauze in. ASER 613:21-25. The medical charges were $18,270.90. ASER 323-38.

After the hospital, Mr. Sebulsky was held in the medical ward of the jail, for an additional month, ASER 615:3-8, where dressings were changed daily. ASER 614:21-24.

4. Mr. Sebulsky's Permanent Physical and Mental Injuries.

As a physical consequence of his injuries, Mr. Sebulsky does not have full strength in his left arm, ASER 616:19-20, his arm is a lot smaller, ASER 617:8, and the back of the arm is numb from arm pit to elbow. ASER 616:17-20; 618:2-22. Mr. Sebulsky has severe scarring. ASER 616:8-10.

As a psychological consequence of the dog's attack, Mr. Sebulsky is fearful around dogs, ASER 619:2-4, and has nightmares during which he wakes up in a cold sweat. ASER 619:6-17.

5. Defendants Used The Dog With Knowledge That The Dog Would Attack Mr. Sebulsky.

Throughout their brief, defendants avoid acknowledging facts reflecting that they knowingly permitted the dog to attack and severely injure Mr. Sebulsky. Instead, defendants characterize their actions as raising only a "deployment" issue, thereby implying that the dog attack was a mere inconsequential or unintended by product of "locating" Mr. Sebulsky. *E.g.*, AOBpp.

1, 6, 8, 16.

In fact, the dog attack was an intended result. The dog is trained to attack. ASER 151:5 - 153:15; 586 ¶13. Based upon the Riverside Police Department Canine Policy, ASER 329-47, using the dog includes letting the dog attack. Under Riverside policy, the term "apprehension" includes having the dog bite a person. ASER 495:11-25. Section 8.5 of the Canine Policy specifically contemplates the use of dogs for "man work" and "attack work."[2] ASER 339.

6. The Characteristics, Training and Use of Defendants' Police Dogs.

Dogs are not capable of exercising human judgment. "A dog is dumb. A dog cannot reason. A dog does not know right from wrong." D. Reaver, *The Search & Bark vs. the Search & Bite Method of Deployment.* "When searching . . . , we are doing nothing more that stimulating a dog's drive to bite a human being." *Id.* "All police service dogs search buildings because they want to bite someone; if they find someone and bite them, they are satisfied." *Id.* Police dogs are large and aggressive, conditioned to bite hard, to bite anywhere on the body, and to continue biting if the victim frees him- or herself from a bite. The dogs are *not* trained to "go for an arm." ASER 5-10, ¶¶ 5-7; 586 ¶13. Furthermore, Riverside's Adlerhorst-trained dogs are more likely to inflict serious injuries than untrained dogs of

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[2] Public demonstration or photographing of "man work" and "attack work" is prohibited without the authorization of the chief of police. Section 8.5 ("Public Relations"), ¶C(3). ASER 339. This is consistent with established police public relations policy in the United States, which is to avoid public dissemination of information regarding the use of dogs to attack people, and to always use euphemisms such as "apprehend" and "seize" rather than "attack" or "bite." This use of language is obviously misleading.

comparable breed.[3]

7. Medical Treatment Required for Police Dog Bite Victims.

An excellent record of medical treatment administered to Adlerhorst-trained dog bite victims is a summary of medical records concerning Los Angeles Sheriff's Department victims, prepared by the County of Los Angeles pursuant to court order.[4] The summary proves that Adlerhorst trained dogs often and consistently inflict serious injuries.[5] In sixteen months (from

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[3] The trainer of Riverside's dogs, Adlerhorst's David Reaver, testified that a "police dog is probably more likely to cause serious injury than a comparable dog." ASER 164:7-15.

[4] ASER 10, 11 ¶¶8, 10. The summary is based on LA County-USC Medical Center records and was compiled pursuant to court orders issued by Magistrate Judge Robert Stone and Judge Wm. Matthew Byrne, Jr., in *Avila v. County of Los Angeles*, CV90-1404 WMB (Sx). ASER 10 ¶8.

[5] A sampling of the injuries the County describes in the *Avila* medical summaries reveal incident after incident of serious injuries:

> -- "Occlusion of right radial [artery]" ASER 208, re Vicente Gaytan];
> -- "Gaping wound on right calf . . . severe pain in right calf . . . deep puncture to ankle of right leg" ASER 208-09, re Gilbert Loya];
> -- "Right leg has multiple lacerations of varying depths; deep lacerations in lower left leg with exposed muscle" [ASER 209, re Ceaser Requena];
> -- "Multiple dog bites to four extremities (both arms and both feet) . . . extensive damage to right upper arm . . ." [ASER 211, re Eugene Grimmett];
> -- "Angiograph showed occlusion of the radial artery to left arm" [ASER 211 re Charles Flores];

August 20, 1988 to January 20, 1990), one dog bit 71 people. *All* required medical treatment. Over one-half required in-patient hospitalization, with an average stay at County-USC Medical Center of four days. Multiple bites, resulting in deep punctures and lacerations, frequently to more than one extremity, requiring multiple sutures and the administration of massive doses of intravenous antibiotics, were the norm. Major vascular injuries, some requiring surgery, were not uncommon. Because of the high incidence of vascular injuries, angiography, an invasive medical

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-- "Patient received severe bites, puncture wounds and lacerations to left upper arm" [ASER 212, re Raul Rosa];
-- "Dog bites to both upper arms with radial injury; occlusion of right radial artery . . ." [ASER 213, re Francisco Rubio];
-- "Deep large bites to both upper arm extremities and two deep 3-4 cm wounds . . . to left leg; left radial artery; staples in left arm and left groin . . . Left inguinal artery occlusion and periosteal injury of left radius and left tibia" [ASER 214-15, re Eddie Venegas];
-- "Dog bites to right and left upper extremities and lower left extremity . . . severe pain and bleeding . . . multiple lacerations to left arm . . . vascular surgery may be needed . . . occlusions of the arteries in both arms existed" [ASER 215, re George M. Van Mierlo];
-- "Multiple dog bites and lacerations to both legs and right arm . . . provided a wheelchair . . . admitted to Jail Hospital . . . received crutches" [ASER 218-19, re Derrell Sanders];
-- "Multiple puncture wounds to right forearm; multiple puncture wounds to anterior thigh and tibia with 1-8 cm ragged laceration with exposed muscle; multiple puncture wounds to left lower extremity anterior tibia" [ASER 224, re Carl Williams];
-- "Multiple dog bites to right thigh, right lower leg and left lower leg . . . Length of Stay (Hospital): 5 days" [ASER 229, re Carlos Holguin].

procedure designed to detect blockage to major vessels, was often necessary. ASER 205-43; ASER 295-97 ¶4(D)-(G).

High hospitalization rates for persons injured by police dogs are the norm. ASER 297 ¶H. It is not uncommon for 50% of persons bitten by the dogs to require in-patient hospitalization. ASER 10-11, ¶9; 22 ¶44; 297 ¶H. Of 225 people bitten by LAPD dogs from June, 1990 to June, 1992, 37% required in-patient hospitalization. ASER 486 ¶3.

In contrast with the high hospitalization rates for persons bitten by police dogs, where the police use physical force other than a dog, the hospitalization rate is only two percent. ASER 486 ¶3. Further, persons injured by police dogs require hospitalization at a rate at least four times as great as persons injured by police baton strikes. ASER 299 ¶O. Overall, persons injured by police dogs are far more likely to sustain serious and permanent injury than persons injured by police baton strikes. ASER 298-300, ¶¶M-Q.

The severity of injuries caused by police dogs has caught the attention of the medical profession. In September, 1990, doctors at LA County-USC Medical Center published a study on the injuries caused by police dogs. K. Snyder & M. Pentecost, *Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites*, ANNALS EMERGENCY MED., Sept. 1990, at 983. ASER 355-58. The doctors reported that: (1) "Dog-bite injuries are unique in that there are both penetrating and blunt components"; and (2) The frequency of arterial injury to extremities inflicted by police dog bites is comparable to the frequency of arterial injury to extremities inflicted by gunshot or knife. The doctors concluded their study by warning their colleagues of the danger of the "significant arterial damage that may require surgical repair." (ASER 357, 358).

8. It Does Not Serve Any Legitimate Police Purpose To Use Dogs To Attack People.

Contrary to popular opinion, police work is not significantly more dangerous than the average job.[6] A police officer is only slightly more likely to be murdered than any other American.[7] Indeed, police work has become increasingly safer;

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[6] As pointed out by two respected commentators:

> "The statistics for injuries and fatalities tell us that policing is a relatively safe occupation compared with fire fighting, shipbuilding, or forestry. The incidence of fatal injuries and injuries involving days lost from work for police is reported as 2.37 events per 100 workers for 1987. The national (U.S.) rate for all industries was 1.86. But policing was safer than fire department work (5.36); ship and boat building (4.20); or forestry (4.10)."
>
> W. GELLER & M. SCOTT, DEADLY FORCE: WHAT WE KNOW 23 (Police Executive Research Foundation 1992) (hereinafter "GELLER & SCOTT") ASER 251.

[7] "In 1990, when 11.1 American police were feloniously slain per 100,000 officers, the murder/nonnegligent manslaughter rate for the general population was 9.4 per 100,000. [Reference to table omitted.] In 1991, the rates changed to 11.9 for police slain and 9.8 for general population homicides. [Reference to table omitted.] Compared in this way, police were approximately 1.2 times more likely than other Americans to be murdered in 1990 and 1991 -- a relatively small difference."

GELLER & SCOTT, *supra*, at 124 (ASER 252).

as of 1989 and 1990, "American police were less likely to be killed in the line of duty than at any time in the past three decades."[8] Activities which might seem "dangerous" to lay persons are, in fact, relatively safe. For example, in 1991, LAPD officers were assaulted seven times, once with a firearm, while making 8,665 burglary arrests. ASER 287, 289, 291. Even the 8,681 arrests for *robbery* -- a "crime of violence" -- resulted in only 18 assaults, nine with firearms.[9] *Id.* The highest number of assaults -- 244, including 31 with firearms -- occurred in responses to "disturbance" calls (e.g., family quarrels). ASER 287 [Item No. 1]. Indeed, it is reported that four times as many police were slain in the ten years 1980-1990 responding to disturbance calls than burglaries.[10] Similar facts led the Supreme Court to conclude in *Tennessee v. Garner* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), that nighttime residential burglary suspects could not automatically be considered "physically dangerous." 471 U.S. at 21.

Well-trained police rarely find it desirable to use any force

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[8] GELLER & SCOTT, *supra*, at 127 (ASER 255). "[O]fficers were not only less likely (based on their numbers on police forces) to get killed over time; they were less likely to be assaulted with the variety of guns, knives, and other dangerous weapons . . . ." *Id.* at 130 (ASER 258).

[9] Only a small number of assaults result in actual injury to an officer. Of the 150 assaults on LAPD officers with firearms in 1991, six resulted in personal injuries. ASER 287, Item Nos. 12, 13. Of the 1056 total assaults, only 148 resulted in injuries to officers. *Id.* In short, of the more than 232,000 arrests by LAPD officers in 1991 (ASER 289, 291 [adult plus juvenile]), officers accomplish at least 99.94% of the arrests without any injury to officers.

[10] GELLER & SCOTT, *supra*, at 221, Table 17 (ASER 259).

at all to take a person into custody,[11] a fact few people outside law enforcement understand. The use of any force which causes serious injury or any injury is even rarer.[12] It is always better *not* to use force, if possible, for using force provokes the use of force against police. ASER 30:1-17. That is why police training emphasizes verbalization, "talking a suspect into custody," through requests, commands, and warnings. ASER 587 ¶17(A). According to Professor Samuel Walker of the University of Nebraska at Omaha, one reason for the reduction in shootings *of* police are restrictions on shootings *by* police. "The general trend has been a long downturn in police officers killed in this country." "That's a result of new rules on police use of deadly force. What that means is that police are shooting less, and consequently, fewer bullets are coming back the other way." *Police feel ever more vulnerable*, Los Angeles Daily News, Feb. 28, 1994, p. 28. *See also* J. Fyfe, *Administrative Intervention on Police Shooting Discretion: An Empirical Examination*, 7 J.

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[11] A normal use of force rate is about one percent. ASER 57:25 - 58:12; *see also* REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, at 36 (1991) ("Christopher Commission Report"). ASER 246. Even if limited to particular crimes, the use of force rate remains at about one percent. The use of force rate for burglary arrests and auto theft arrests is one percent while the rate for robbery and assault with a deadly weapon arrests is two percent. ASER 486-87, ¶4; 489.

[12] In 1991, the LAPD, in making 232,256 arrests, used physical force above firm grip compliance in 2574 arrests (for a 1.1% use of force rate). Fifty-six per cent (56%) of all use of force incidents resulted in *no* injuries to persons arrested. Furthermore, of those injured (1136) there were but 34 injured so severely as to require in-patient hospitalization. In other words, 99.99% of all arrests were accomplished without causing serious injuries to those arrested. ASER 12-13 ¶17; 76:18 - 77:12.

CRIM. JUST. 309 (1979).

The physical dangers necessarily resulting from escalating to higher levels of force also attend dog attacks. A person attacked by a vicious animal will naturally attempt to defend himself or herself. ASER 588 ¶17(C). Anyone who does have a weapon will probably try to use it. ASER 26:3-18. Police themselves shoot less dangerous dogs, on less provocation. ASER 29:1-14. Once a confrontation escalates to shooting, everyone -- innocent bystanders, the police and the suspect -- is in greater danger. Someone being attacked cannot be trusted to shoot straight or stop at the dog. Dog handlers, who will be near the dog, find themselves exposed to gunfire, in a dangerous shoot/don't shoot situation, the very scenario they are trained to avoid. ASER 588-89 ¶17(C)-(D). Thus, any person attacked by a dog who is armed will likely be killed, since it will be difficult, probably impossible, to know what an armed person being attacked by a dog, who will naturally try to defend himself or herself by whatever means are available, might hit.[13]

Defendants *know* that using dogs to attack people believed armed with weapons increases the risks to police. A person with a gun who is attacked by the dog is encouraged to fire his gun at the dog and its handler: "[I]f we let the dog go in to make the apprehension [of an armed suspect], the likelihood of a dog getting hurt is very great; the likelihood of an officer getting hurt

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[13] In *Rose v. City of Los Angeles*, 814 F. Supp. 878 (C.D. Cal. 1993), the dog bit the suspect and, by severing the femoral artery, inflicted a probable fatal injury. The suspect allegedly displayed a weapon and the handler shot the suspect to death. In another incident which occurred in January, 1992, an apparently intoxicated medical doctor became involved in a neighborhood dispute to which the police were summoned. When he refused to give up his gun, the police ordered a dog to attack. The doctor tried to shoot the dog and was shot to death by the police. *O'Brien v. City of Palm Springs*, SACV93-101 AHS (RWRx).

is also very great . . ." ASER 508:1 - 509:25 (Deposition testimony of Riverside P.D. canine unit supervisor). No wonder defendants' dog and handler trainer is unaware of any study that says allowing a dog to bite a person enhances officer safety. ASER 163A:23 - 163B:3, 163B:23. And no wonder the Riverside canine policy forbids letting the dog attack a suspect believed to be armed. ASER 508:9-20.

The claim that an attacking dog is effective against a person armed with a weapon is a myth. Inspired by the popular fantasies of *Rin-Tin-Tin* and *Lassie*, the police peddle the myth to a fearful and gullible public to excuse unnecessary, unreasonable and frequently sadistic, malicious dog attacks. Of course, defendants know better. "A police service dog does not have the ability to understand what a criminal is, what a weapon is, or how dangerous a situation is. To attempt to teach him this assumes he has the ability to reason . . . ." D. Reaver, *supra*, *The Search & Bark vs. the Search & Bite Method of Deployment*. Police dogs are not trained to attack a hand with a weapon in it or even to recognize a weapon; as a practical matter, it is not possible to train the dog to do so, for it can not tell the difference between a gun and a tin can. ASER 156:4-9, 156:24 - 157:8.

The facts are that the police do *not* use dogs to attack armed people. From June, 1990 to June, 1992 (during which time LAPD policy was to permit dogs to attack people without any announcement, warning, or opportunity to surrender), LAPD dogs bit 225 people, two of whom were armed. ASER 486 ¶3. Dogs used by the Santa Ana police department have never bitten an armed suspect. ASER 82:11-18. Riverside's dog trainer does not even have an estimate of the percentage of persons bitten by police dogs who were, in fact, armed. ASER 163A:12-19.

Not surprisingly (ASER 587-90 ¶¶17(A)-(E), 19), police

are more likely to be injured by police dogs than by suspects.[14] Often, the intended victim of the dog's attack attempts to defend himself or herself and an officer joins the fray, only to be bitten by the dog.[15] ASER 588 ¶17(C). On other occasions, the dog simply misses the intended victim and attacks an officer.[16] This should not surprise anyone since the dogs cannot distinguish between a suspect and a non-suspect. ASER 164A:8-25.

9. Richardson's Deliberate Indifference.

Richardson formulated no policy defining when a dog is allowed to bite. ASER 494:9 - 495:10; 496:1-4; 499:17-22. Richardson's only instruction to his dog handlers was left was that the dogs can be used when it is legal and moral do so; he left it up to the individual handler to decide what is permissible under this standard. ASER 506:19 - 507:5.

Richardson relied upon an uninformed commercial vendor of dogs to train Riverside dogs and handlers that police dog

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[14] Police dogs injure LAPD officers at a rate more than three times the rate at which suspects injure officers. ASER 15-16 ¶21, 22 ¶22, 302.

[15] As conceded by Sgt. John Bell, the most frequently used defense expert in police dog bite cases: "I've been bitten by my own dog in physical altercations with individuals. . . . The dog came in the dark and I was the one that got it first." 10/23/92 Trial Testimony of John W. Bell, 56:3 - 57:1, *Leichman v. Redondo Beach*, CV90-1884 GHK.

[16] LASD Deputy Sheriff Michael Brooks (over 100 stitches), *Brooks v. County of Los Angeles*, CV 90-5465 R; Santa Ana Police officer Dianna Lee (severe injuries) ASER 171:25 - 172:8; West Covina Police Officer Gary Christensen (patrol career ended by police dog attack), ASER 590 ¶19; CHP Officer William Pinzon (right ear nearly severed from body), ASER 132:9-25, 133:8-20.

attacks are *less* likely to cause injury than police baton strikes. ASER 498:16-24; 511:25 - 512:2; 512:8-25; 501:24 - 502:4. Richardson has never done or authorized any studies regarding the types or the extent of injuries that the dogs inflict when they bite, ASER 501:20-23, or directed anyone to compare dog bite injuries to baton injuries. ASER 502:5-9. Richardson has never authorized any research or study into the reaction of a person faced with or attacked by a police dog. ASER 505:18-21. Under Richardson's command, the department ignores bite ratios for its dog handlers. ASER 500:11 - 501:1.

Ninth Circuit Opinion.

The Ninth Circuit held that Richardson and Blevins were entitled to qualified immunity as a matter of law. The Circuit specifically relied on *Chew v. Gates*, 27 F.3d 1432, 1447-49 (9th Cir. 1994), in which a divided court held that while the City of Los Angeles' use of dogs to attack and bite suspects might be unconstitutional, Los Angeles Chief of Police Daryl Gates and other officers were entitled to qualified immunity because it was not clearly established that using *dogs* to attack and mutilate people violated the Fourth Amendment. Circuit Judge William A. Norris, dissenting in *Chew v. Gates*, reasoned that "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." 27 F.3d at 1458 (Norris, J., dissenting).

REASON FOR GRANTING THE WRIT

1. **The Court Should Hold That Police Officials Who Knowingly Use Weapons, *i.e.*, Attack Dogs, To Injure People Are Not Entitled To Qualified Immunity Merely Because The Courts Have Not Previously Held That The Serious Injuries Which Police Officials Know Or Should Know The Dogs Inflict Are Serious Injuries.**

SUMMARY OF ARGUMENT

When Blevins let the dog attack Mr. Sebulsky, it was clearly established that the Fourth Amendment governed all seizures of free citizens by the police. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). *Any* force used was governed by *Graham v. Connor's* objective reasonableness standard. *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (*en banc*). It was also clearly established that seizure by any means, including a police-sanctioned dog attack, was a "seizure" under the Fourth Amendment. *Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (police roadblock is Fourth Amendment seizure); *Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989) (City of West Palm Beach policy permitting dogs to attack suspects violates Fourth Amendment); *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) (police dog attack analyzed under Fourth Amendment); *Marley v. City of Allentown*, 774 F. Supp. 343, 346 (E.D. Penn. 1991), *aff'd without opn.*, 961 F.2d 1567 (3rd Cir. 1992) (police dog attack may be considered "deadly force" under *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). Furthermore, *Tennessee v. Garner* clearly established that the police may not use deadly force to seize a person unless there exists probable cause that the suspect presents an immediate threat of death or serious injury. 471 U.S. at 11-12. It was also clearly established that deadly force is not limited to just guns. *United*

States v. Sanchez, 914 F.2d 1355, 1363 (9th Cir. 1990) (car is deadly weapon); *see Tennessee v. Garner, supra*, 471 U.S. at 31 (O'Connor, J., dissenting) (any potentially lethal weapon is deadly weapon). Qualified immunity is not available, for "[i]n Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits." *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992); *see also Street v. Parham*, 929 F.2d 537, 540 (10th Cir. 1991) ("determination of liability and the availability of qualified immunity depend on the same findings"). The Ninth Circuit wrongly presumed that there must be judicial resolution of the appropriate use of the particular *police instrumentality* before police officers can be held accountable for the injuries the officers know that the instrumentality will inflict.

ARGUMENT

I. IT WAS CLEARLY ESTABLISHED THAT *ANY* FORCE USED IN MAKING AN ARREST MUST BE OBJECTIVELY REASONABLE.

The " 'key principle of the Fourth Amendment' " is the " 'balancing of competing interests.' " "To determine the constitutionality of a seizure," one must " 'balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *Tennessee v. Garner, supra*, 471 U.S. at 8; *see also Graham v. Connor, supra*, 490 U.S. at 396. "[T]he Fourth Amendment's command that searches be 'reasonable' requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search 'reasonable.' " *Winston v. Lee*, 470 U.S. 753, 767, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985)

" '[T]he integrity of an individual's person is a cherished value of our society.' " *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (*quoting Schmerber v. California*, 384 U.S. 757, 772, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). "A crucial factor in analyzing the magnitude of the intrusion . . . is the extent to which the procedure may threaten the safety or health of the individual." *Winston v. Lee*, 470 U.S. 753, 761, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985). While a seizure which involves "virtually no risk, trauma or pain" may be constitutionally permissible, *Schmerber, supra*, 384 U.S. at 771, a more intrusive procedure involving, for example, risk of "infection and pain" may not be. *Id.* at 772. *See also, e.g., Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952) (use of emetic to induce vomiting constitutionally unreasonable because "too close to the rack and the screw to permit of constitutional differentiation").

The "nature and quality of the intrusion" (*Garner, supra*) includes *all* the consequences -- not just a clinical description of the injury. Police dog bites are *disfiguring*. Society especially condemns the infliction of disfiguring injuries, *People v. Pullins*, 95 Cal. App. 2d 902, 214 P.2d 436 (1950), as reflected in the penal statutes punishing the crime of *mayhem*, the unlawful and malicious disfigurement of a human being. Cal. Penal Code § 203. The punishment for mayhem is greater than the punishment for assault with a deadly weapon.[17] Aggravated mayhem[18] is

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[17] Assault with a deadly weapon is punishable as either a misdemeanor or felony by imprisonment in a county jail not exceeding one year, or in a state prison for two, three or four years, or by fine not exceeding ten thousand dollars, or by both such fine and imprisonment. Cal. Penal Code § 245(a)(1). Mayhem is punishable as a felony *only*, by imprisonment in the state prison for two, four, or eight years. Cal. Penal Code § 203.

punishable by *life* imprisonment. Cal. Penal Code § 205. Even the punishment for assault with a *firearm* is less than the punishment for simple mayhem. *Compare* Cal. Penal Code § 245(a)(2) *with* Cal. Penal Code § 203.

Disfiguring injuries are more serious because of the effect they have. "The law of mayhem as it has developed protects the integrity of the victim's person." *People v. Page*, 104 Cal. App. 3d 569, 578, 163 Cal. Rptr. 839, 843 (1980) (application of permanent tattoos to victim's body is mayhem). " '[T]he modern rationale of the crime may be said to be the preservation of the natural completeness and normal appearance of the human face and body.' " *People v. Newble*, 120 Cal. App. 3d 444, 451, 174 Cal. Rptr. 637, 640 (1981) (inflicting three inch long scar is mayhem). Disfiguring injuries are a "daily reminder" of the horror of the underlying event and of the "emotional disability that frequently attends a mutilation of this sort." *People v. Keenan*, 227 Cal. App. 3d 26, 36, 277 Cal. Rptr. 687, 693 (1991) (burning a person with cigarette causing a scar is properly punishable as mayhem). Dog bite injuries, which necessarily puncture and lacerate the skin, leave disfiguring scars. The mutilation of Mr. Sebulsky's arm is, of course, a good example.

The "nature and quality of the intrusion" (*Garner, supra)* is also not limited to the physical; it includes *mental* or *emotional* injury. Intrusions which "damage the individual's *sense* of personal privacy and security" are subject to the Fourth Amendment's dictates. *Winston v. Lee, supra*, 470 U.S. at 762. Even strip searches and body cavity searches, although they cause no physical injury at all, may violate the Fourth Amendment.

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[18] A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disfigurement of another human being. Cal. Penal Code § 205.

Ward v. County of San Diego, 791 F.2d 1329 (9th Cir. 1986); *Kennedy v. Los Angeles*, 901 F.2d 702 (9th Cir. 1989). *Torture* and murder by torture are specially heinous because they cause mental suffering through the infliction of cruel or extreme pain. Cal. Penal Code § 206; *People v. Wiley*, 18 Cal. 3d 162, 168, 133 Cal. Rptr. 135, 554 P.2d 881 (1976). Torture is one of the most reprehensible of crimes and is punishable by life imprisonment. Cal. Penal Code § 206.1. Murder by torture is a death penalty offence. Cal. Penal Code § 190.2 (14).

Large, aggressive animals terrify people.[19] ASER 586-87, ¶¶15, 16. Permitting a police dog to attack a person may be "subhuman and vicarious animalism," *Miller v. United States*, 404 F.2d 611, 612 (5th Cir. 1968), because animal attacks evoke primal fear.[20] Afraid of being eaten, people become hysterical.

In America, judicial concern about the use of dogs to attack humans is reflected in ante-bellum statutes and decisions addressing the practices of slavery. As reported in *Moran v. Davis*, 18 Ga. 722 (1855), in 1852 the State of Georgia specifically prohibited owners, hirers and overseers of slaves from engaging in specific acts of cruelty, in particular "beating, cutting or wounding, and *unnecessarily biting or tearing with dogs*." *Id.*

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[19] It is this quality which makes dogs a useful police tool. "Nothing 'cools' a potentially violent situation more quickly than the sight of police canine." INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, TRAINING KEY # 238, *Police Dogs*, ASER 260.

[20] "I kind of swatted at [the bear] and he basically started chewing on my head. It was pretty terrifying. . . . (The attack) was probably two minutes, but it seemed like an hour." The young camper's surgeon states "[t]he major (health) concern to me would be psychological injury . . ." *Scout Tells of His Tussle With Bear at Campsite*, Los Angeles Times, Aug. 8, 1993, at A3, col. 1, 4.

at 724 (emphasis added). The question of when dogs could be used on slaves reached the Georgia Supreme Court in *Moran v. Davis*, which held that tracking down an escaped negro slave with dogs trained to "lacerate or wound" would violate the property rights of the slave's owner. The defendant in *Moran v. Davis* had used dogs to track the "negro boy Stephen" who was not bitten but, in an effort to avoid the dogs, had merely plunged into a creek and drowned. *Id.* at 722. This "acceptable" use of dogs was upheld because of the perceived need to "redouble our vigilance and to tighten the cords that bind the negro to his condition of servitude -- a condition which is to last, if the Apocalypse be inspired, until the end of time." *Id.* at 724.

II. IT WAS CLEARLY ESTABLISHED WHEN "DEADLY FORCE" MAY BE USED TO SEIZE A PERSON.

A. It Was Clearly Established That "Deadly Force" May Only Be Used Where There Is Probable Cause That The Suspect Presents An Immediate And Credible Threat Of Death Or Serious Injury.

In Tennessee v. Garner, supra, the Supreme Court held that a police officer may use deadly force to prevent the escape of a fleeing felon only when the officer has probable cause that the suspect poses an immediate threat of serious physical harm to the officer or to others. "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." 471 U.S. at 11-12. Since the *Garner* decision, the rule on police use of deadly force is clearly established. *Ting v. United States*, 927 F.2d 1504, 1510 (9th Cir. 1991).

There was no probable cause that Mr. Sebulsky posed a threat of death or serious injury here. Police do not have probable cause to believe a suspect is dangerous merely because they can

not rule out that possibility. In *Tennessee v. Garner*, the lower court found the officer could not be certain that the deceased was unarmed. Significantly, Justice White's opinion of the Court concluded, "Restated in Fourth Amendment terms, this means [the officer] had no articulable basis to think [the suspect] was armed." 471 U.S. at 20. Therefore, unless the police have some actual information that a person presents a real threat (as opposed to speculation that a person could be dangerous because anybody could be), there is no probable cause that the suspect is dangerous.

B. It Was Clearly Established That "Deadly Force" Is Any Force Which Is Reasonably Capable Of Causing Death Or Serious Injury.

Consistent with Justice O'Connor observation in *Garner* that the Court's decision applied to "any police practice that is potentially lethal, no matter how remote the risk," 471 U.S. at 31 (O'Connor, J., dissenting), courts, just as they did before *Garner*, recognize deadly force to be *any* force reasonably capable of causing death or serious injury, regardless of the particular *instrumentality*. Standard reference works recognize that "a deadly weapon is any device which as used is capable of causing death or serious bodily injury by its design or construction." Annot., 7 A.L.R. 4th 607, 608 (1981). The Model Penal Code defines "deadly weapons" to include both animate and *inanimate* instrumentalities. MODEL PENAL CODE § 212.4(4). Under *strictly construed* penal statutes, *e.g.*, 18 U.S.C. §§ 111 and 1114 (1982) (assault on a federal officer with a deadly and dangerous weapon), a deadly weapon is " 'any object which, as used or attempted to be used, may endanger the life of or inflict great bodily harm on a person.' " *United States v. Sanchez*, 914 F.2d 1355, 1358-59 (9th Cir. 1990). " 'Serious bodily harm' has been defined as something more than minor injury, but not necessarily injury creating a substantial likelihood of death." *United States v. Moore*, 846 F.2d 1163, 1166 (8th Cir. 1988). Serious bodily

injury " 'does not require a high probability of death.' " *United States v. Demery*, 980 F.2d 1187, 1190 (8th Cir. 1992). Thus, in *Mathis v. Parks*, 741 F. Supp. 567, 572 & n.3 (E.D.N.C. 1990), the court applied the *Garner* rule to a full-force blow to the abdomen, while in *Marley v. City of Allentown*, 774 F. Supp. 343, 346 (E.D. Penn. 1991), *aff'd without opn.*, 961 F.2d 1567 (3rd Cir. 1992), the district court applied the *Garner* rule to a police dog.

Of course, it is *not* necessary that the weapon actually cause death or serious injury to be considered "deadly." *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987) ("the use of deadly force does not occur only when the suspect actually dies"); *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (same). "[I]t is the *capacity* for harm in the weapon and its use that is significant, not the *actual* harm inflicted." *United States v. Moore*, *supra*, 846 F.2d at 1167 (emphasis in original).

Biting is assault with a deadly and dangerous weapon simply because of the possibility of serious infection: "We reaffirm that this potential for 'serious infection' is a form of 'serious bodily harm' . . ." *United States v. Moore*, *supra*, 846 F.2d at 1164, 1167. Causing a large dog to attack a person is assault with a deadly weapon. *See, e.g., People v. Nealis*, 232 Cal. App. 3d Supp. 1, 3, 283 Cal. Rptr. 376, 378 (1991); *State v. Bowers*, 239 Kan. 417, 721 P.2d 268, 273-275 (1986); Annot., *supra*, 7 A.L.R. 4th at 608. Just permitting a large dog to "lunge, jump and chomp at" a person at close range, is assault with a deadly weapon. *Michael v. State*, 160 Ga. App. 48, 286 S.E.2d 314 (1981).

Even law enforcement acknowledges that deadly force is properly defined as force which is reasonably capable of causing death or serious injury. According to the respected Police

Executive Research Forum,[21] there is "general agreement that the term ['police use of deadly force'] means force reasonably capable of causing death or great bodily harm." GELLER & SCOTT, *supra*, at 23 (ASER 251).

Finally, in virtually every reported decision the police dog inflicted serious and life-threatening injuries. *Kopf v. Wing*, 942 F.2d 265, 267 (4th Cir. 1991) (victim "frightfully mauled" by police dog; lacerations of the upper lip, chest, knee, leg, and scrotum; victim in critical condition); *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1550 (11th Cir. 1989) ("suspects often suffer serious injury from multiple bites received during the course of" police dog attacks); *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) (police dog kills suspect); *Rose v. City of Los Angeles*, 814 F. Supp. 878, 879 (C.D. Cal. 1993) (police dog "sever[ed] femoral artery"); *Marley v. City of Allentown*, 774 F. Supp. 343, 344 (E.D. Penn. 1991) (police dog "seriously injured" plaintiff); *Chew v. Gates*, 744 F.2d 952, 953 (C.D. Cal. 1990) (victim's arm "almost severed" by police dog); *People v. Rivera*, 8 Cal. App. 4th 1000, 1005, 10 Cal. Rptr. 2d 785, 788 (1992) (police dog "locked [its] jaws" on defendant's *head*).

III. *ROBINETTE V. BARNES* DID NOT PERMIT USING ATTACK DOGS TRAINED TO INFLICT SERIOUS INJURIES.

Reliance on *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) to justify attack dogs is misplaced.

Any reasonable officer reading *Robinette* would recognize that an Adlerhorst-trained dog attack is "deadly force" within the meaning of *Tennessee v. Garner*. *Robinette* held that whether a

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[21] LAPD Chief Willie Williams testified that the Police Executive Research Forum is a reliable source of information on law enforcement standards. ASER 177:21 - 178:16.

dog is "deadly force" depends upon the dog's capacity to cause serious injury or death. That Barnes' Nashville PD dog killed Daniel Briggs was not controlling because it was highly improbable given the dog's special training. 854 F.2d at 912. Based on the evidence the court had, it concluded that the dog did not create a substantial risk of serious injury or death. (In reaching its conclusion the court presumed, apparently without any evidentiary support, that dog attacks to the arm do not create a substantial risk of serious injury. 854 F.2d at 912-13 & n.3.) However, the *Robinette* court warned that "an improperly trained dog" (*i.e.*, a dog reasonably capable, because of its training, of causing serious injury or death) "could transform the use of the dog into deadly force," 854 F.2d at 913. Other courts have understood. "*Robinette* takes the common-sense approach that objects other than the obviously lethal gun or knife can cause death. . . . Thus, the determination of whether deadly force has been used to effect a seizure must be made on a case-by-case basis." *Mathis v. Parks, supra*, 741 F. Supp. at 572 n.3 (applying *Garner* rule to full-force blow to the abdomen). *Marley v. City of Allentown, supra*, 774 F. Supp. at 346, where a jury was properly instructed that a police dog attack may constitute "deadly force," is the obvious consequence of *Robinette's* holding.

IV. RICHARDSON, THE CHIEF OF POLICE, DOES NOT ENJOY IMMUNITY.

In most post-*Graham v. Connor* Fourth Amendment excessive force cases, no special qualified immunity inquiry is required. "In Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits." *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992); "No officer could reasonably believe that the use of unreasonable force did not violate clearly settled law. . . . This is one of the rare instances where the determination of

liability and the availability of qualified immunity depend on the same findings." *Street v. Parham, supra*, 929 F.2d at 540. *Hammer v. Gross, supra*, where the Court found immunity, is not inconsistent. There, the offensive conduct pre-dated *Graham v. Connor*. The law was therefore not clearly established. "Reasonable officers . . . cannot be required to have anticipated the ruling in *Graham*." *Hammer*, 932 F.2d at 850.

The claim that the law on excessive force was not "clearly established" is unfounded. All that is required is that "[t]he contours of the right . . . be sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The law in Fourth Amendment excessive force cases is well settled. *Graham v. Connor* held that the Fourth Amendment "objective reasonableness" standard applies to all force used to arrest a free citizen, not just to "deadly force." *Tennessee v. Garner* made clear under what circumstances the use of "deadly force" was permissible. *Robinette v. Barnes*, like cases that precede and follow it, recognized that dogs may be "deadly force" and that a police dog reasonably capable of inflicting serious injuries would not be permissible absent compliance with the *Garner* rule. Relying, in part, upon *Robinette*, the district court in *Marley*, held that a police dog may be a deadly weapon.

The law has made it unmistakably clear that the reasonableness of a seizure will depend on its intrusiveness, that intrusiveness is measured principally by the injuries likely to be inflicted, and that it makes no difference whether those injuries are inflicted by guns, cars, knives, clubs, chokeholds, dogs, mountain lions or rattlesnakes. To argue that the police can not be held responsible for the injuries *dogs* inflict because no *court* has ever told the police that they will be held liable, is evidence of their irresponsibility. It brings to mind the admonition that "[i]t would create perverse incentives indeed if a qualified immunity defense

could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books." *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992). Public officials, including police, have no claim to more specific "notice" of what a deadly weapon is than ordinary citizens *charged with crimes*. No one *criminally charged* would get away with siccing a trained attack animal on another person by complaining that no *case* had previously held such attacks to be an assault with a deadly weapon, see, e.g., *People v. Nealis*, *supra*, even though the Constitution specially guarantees the criminally accused "fair notice that his contemplated conduct is forbidden." *United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808 (1954). Every citizen is required to exercise a modicum of sound judgment. Public officials, especially the police, because of their training, experience and position, are no exception.

V. THE DOG HANDLER DOES NOT ENJOY IMMUNITY.

As a practical matter, the availability of immunity will in the large majority of excessive force cases turn on the fact-finder's resolution of disputed facts. If the incident occurred as the plaintiff alleges, all will agree that the force was excessive; if as the police claim, reasonable. Thus, it will be true that deciding whether there was a "constitutional violation" and whether the officer deserves immunity will be one and the same. This reality, combined with the logical force of the argument that no officer could reasonably believe that unreasonable force was reasonable, supports the conclusion that qualified immunity is not an issue in post-*Graham v. Connor* excessive force cases.

However, in cases like this one where a lower level public employee, *e.g.*, a patrolman in a police paramilitary organization, is following the orders of superior officers, the equation becomes

more complicated. In such cases, it may be both fair and prudent to recognize the existence of a narrowly limited "superior orders" "defense."[22] Organizations, especially paramilitary organizations, depend on subordinates' following orders. There is a difference in function, experience and responsibility between supervisors who give orders and subordinates who are expected, trained and paid to carry them out. Police chiefs should be more attuned to what is "clearly established law" and expected to exercise better judgment than lower level subordinates. The primary responsibility for bad policy decisions should not fall on the least culpable, the person at the low end of the chain of command.

Of course, "superior orders" may *not* legitimately be considered a factor in determining whether force is constitutionally reasonable. Giving any weight at all to orders approving the use of force is antithetical to the basic structure of Fourth Amendment jurisprudence. It is inconsistent with the Supreme Court's mandate that Fourth Amendment seizures be judged "objectively," and creates a "Catch-22" that virtually eliminates any chance that a jury will ever find anyone, much less a responsible public entity or supervisor, liable for constitutional violations committed pursuant to an official policy or practice.

A subordinate officer like Blevins, should therefore, not enjoy immunity because he followed orders. As the Nuremberg experience exemplifies, the immunity must be narrow. While Officer Blevins is certainly less culpable than Chief Richardson, he is not without fault. Blevins should have known, despite his superiors' approvals, that what he was doing was wrong. The use of dogs to attack people is premised on the factually untrue assumption that they are not reasonably capable of inflicting serious injury or death. Although this is what Blevins was told,

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[22] Where the word "defense" is used in quotation marks, it refers to qualified immunity.

he had to know better. He trained with the dog, used the dog, and must have seen what it did. Given Blevins' first hand experience, he had to realize the severity of the injuries the animal would likely inflict. That he was told that the dog was not likely to inflict serious injuries when it attacked did not permit him to ignore what he knew to be the truth from his own experience.

The factual question upon which Blevins' entitlement to immunity should hinge is whether he knew. If he did not know and was merely following orders in ignorance, he should be entitled to qualified immunity. On this record, however, that question can not be resolved in Blevins' favor. The district court was clearly correct in denying Blevins' motion for summary judgment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93-56542
D.C. No. CV-92-00533-LHM (R
MEMORANDUM*

GEROLD A. SEBULSKY,

Plaintiff-Appellee,

v.

FILED
FEB 3 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CITY OF RIVERSIDE,

Defendant

and

SONNY RICHARDSON, Chief of Police, for the City of Riverside, California; E. BLEVINS, Police Officer, for the City of Riverside, California,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California
Linda H. McLaughlin, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued August 3, 1994
Pasadena, California
Submission Deferred August 3, 1994
Resubmitted January 1, 1995

Before: O'SCANNLAIN and T.G. NELSON, Circuit Judges, and MERHIGE,** District Judge

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1992); see also Mitchell v. Forsyth, 472 U.S. 511, 528 (1985) (officials are immune unless "the law clearly proscribed the actions" they took). "The decisive fact is not that [the official's] position turned out to be incorrect, but that the question was open at the time he acted." Mitchell, 472 U.S. at 535.

At the time of Sebulsky's arrest, there was no clearly established law prohibiting the use of dogs in the manner permitted by the Riverside Police Department's canine policy. See Chew v. Gates, 27 F.3d 1432, 1447-49 (9th Cir. 1994), petition for cert. filed, 63 U.S.L.W. 3463 (U.S. November 28, 1994) (No. 94-980). It is clear under Chew that Chief Richardson is entitled to qualified immunity. See id. at 1446-50. In this case, as in Chew, "a reasonable law enforcement official might well have failed to recognize that authorizing or implementing the policy at issue would result in the violation of the constitutional rights of persons seized by the police dogs." Id. at 1447; see also id. at 1446 (evaluating the issue of qualified immunity under the

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** Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

assumption that the "departmental policy authorized the use against all concealed suspects of dogs trained to search for and apprehend persons by biting and seizing them"). The district court therefore erred in denying Richardson's motion for summary judgment.

Merely pleading deliberate indifference on the part of Chief Richardson will not overcome the qualified immunity defense. See Hamilton v. Endell, 981 F.2d 1062, 1066 (9th Cir. 1992) ("A finding of deliberate indifference necessarily precludes a finding of qualified immunity...." (emphasis added)); Wood v. Ostrander, 879 F.2d 583, 591 n. 7 (9th Cir. 1989) ("Should the trier of fact find that [defendant's] treatment of [plaintiff] was deliberately indifferent, this alone might deprive [defendant] of his qualified immunity defense." (emphasis added)), cert. denied, 498 U.S. 938 (1990). To survive summary judgment on the failure to train and properly supervise/evaluate theory, Sebulsky must set forth specific facts as to Richardson's deliberate indifference. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988) (section 1983 claim based on alleged Eighth Amendment violation). Sebulsky's evidence does not meet this threshold.

Sebulsky contends that Richardson was deliberately indifferent in failing to train officers regarding the constitutional limitations of the use of dogs to bite, and in his "irresponsible reliance" on a commercial dog handler to train officers who are dog handlers. However, Sebulsky has not specifically identified how the training was deficient, or come forward with sufficient evidence to demonstrate a need for more or different training to prevent constitutional violations by officers. See City of Canton v. Harris, 489 U.S. 378, 389-91 (1989) (discussing inadequate training theory of municipal liability). Sebulsky's arrest was not so outrageous an incident as to itself indicate a policy of indifference to or tolerance of constitutional violations. See id. at 390 n.10. Furthermore, Sebulsky has in no way distinguished his case from Chew, in which we concluded that the then Los Angeles Police Chief, Daryl Gates, was

entitled to qualified immunity in his individual capacity, because at the time of Chew's arrest, "the Los Angeles Police Department's longstanding policy regarding the training and use of police dogs did not contravene clearly established law." Chew, 27 F.3d at 1448 (emphasis added); see also id. at 1449 (noting similarity between Los Angeles Police Department canine policy "to the policies employed in many police departments throughout the nation, none of which had been judicially questioned").

Sebulsky also contends that Richardson was deliberately indifferent to the consequences of using dogs to attack people, and in failing to monitor bite ratios and the actual effectiveness of police dogs in the field. He contends that Richardson's lack of knowledge concerning the training and actual use of dogs by his police force evidences deliberate indifference. However, Sebulsky did not come forward with sufficient evidence to even establish this lack of knowledge, let alone demonstrate that it constituted deliberate indifference under the facts of this case. Sebulsky's summary judgment response did not demonstrate that Richardson was deliberately indifferent tot he consequences of the use of dogs to attack suspects.[1] While the deposition testimony of Lieutenant Nessin indicated that the Riverside Police Department does not keep records on dog handlers' "bite rate" or generate a statistical report of "bite ratios," this does not raise a genuine issue of material fact concerning Richardson's deliberate indifference. In short, Sebulsky has not built an adequate circumstantial evidence case of deliberate indifference through action or

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1 Sebulsky offered the deposition testimony of Lieutenant Watch Commander Gary Nessin, who testified that in cases involving dog bite injuries, there was "review [by] the chain of command, and they may have the policy review committee in some instances." Sebulsky did not offer any deposition testimony by Chief Richardson.

inaction on the part of Richardson. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (once moving party meets summary judgment burden, opposing party must set forth specific facts showing that there is a genuine issue for trial).

Officer Blevins is also entitled to qualified immunity. The law was not clearly established at the time of Sebulsky's arrest such that a reasonable officer in Blevins' position would have known that his actions in deploying a dog to search for, locate and bite a suspect intentionally evading arrest for over an hour by hiding under bushes violated a clearly established right. See Chew, 27 F.3d at 1447-49. Sebulsky has not alleged the type of circumstances involving use of a police dog that violate clearly established law. See id. at 1448-49 (citing Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994) (giving example of officer siccing dog on handcuffed arrestee)). The district court erred in denying Officer Blevin's motion for summary judgment.

The order of the district court is vacated and remanded with an instruction to enter an order granting summary judgment in favor of Chief Richardson and Officer Blevins. No costs allowed.

VACATED AND REMANDED.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-56542
D.C. No. CV-92-00533-LHM(R

FILED
MAR 16 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

GEROLD A. SEBULSKY,

Plaintiff-Appellee,

v.

CITY OF RIVERSIDE,

Defendant

and

SONNY RICHARDSON, Chief of Police, for the City of Riverside, California; E. BLEVINS, Police Officer, for the City of Riverside, California,

Defendants-Appellants.

Before: O'SCANNLAIN and T.G. NELSON, Circuit Judges, and MERHIGE, District Judge[1]

Judges O'Scannlain, T.G. Merhige vote to deny appellant's petition for rehearing. Judge O'Scannlain and Judge T.G. Nelson vote to reject the suggestion for rehearing

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[1] Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

en banc, and Judge Merhige so recommends.

The full court has been advised of the suggestion for en banc hearing and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

CENTRAL DISTRICT OF CALIFORNIA

Cald

CIVIL MINUTES – GENERAL

Case No. CV92-533 LIM( ) Date 9/18/93

Title SEBULSKY v. CITY RIVERSIDE ET AL.

DOCKET ENTRY

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY [illegible] ON ALL COUNSEL (OR PARTIES) IN THIS ACTION BY MAILING A COPY TO EACH IN A SEALED ENVELOPE ADDRESSED TO EACH AS SHOWN ON THE LAST MAILING LIST TO COUNSEL OF RECORD ON THIS DATE.

9/20/93

DEPUTY CLERK

PRESENT:

HON. LINDA M. McLAUGHLIN, JUDGE

SHERYL RITCHEY
Deputy Clerk

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None Present

ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

PROCEEDINGS: DEFENDANTS' MOTION FOR SUMMARY JMT AND M&C

IN CHAMBERS:

The Court, on its own motion, hereby VACATES the ~~aforementioned~~/Defendant(s) hearing on 10/4/93 AND M&C ON 10/4/93 F.R.Civ.P. 78; Local Rule 7.11. Based on the papers submitted by the parties and applicable law, the Court now rules as follows:

(1) The Court has read and considered all moving, opposition, reply and supplemental reply papers, together with all evidence submitted and received. For reasons stated below, the Court issues rulings on Count 1 and continues Motion as to Count 2 for further briefing.

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Initials of Deputy Clerk SLR

MINUTES FORM 11
CIVIL—GEN

D — M
Page - 1

CIVIL MINUTES - GENERAL
- Continued

CASE NO. CV 92-522 -LHM( ) DATE: 9/18/93

TITLE: _____

PROCEEDINGS CONTINUED:

Count 1--Unreasonable Force

(1) Ruling:

--(i) Granted: Summary Judgment is granted to Defendants Barnes, Belts, Figueroa, Hexmeier, McGowan, Mears, Perea, Reeves, Rubio, Taylor, and Wagner.

--(ii) Denied: Summary Judgment is denied to Defendants Blevins, Richardson, and City of Riverside.

(2) The Evidence--Plaintiff's version is accepted to establish uncontroverted facts. The following evidence was submitted by the parties: Depositions of Sobulsky and Hinson; Declarations of Cook, Bogardus, Barnes, Belts, Blevins, Figueroa, Hexmeier, McGowan, Mears, Perea, Reeves, Richardson, Rubio, Taylor, and Wagner; and documents and exhibits incorporated therein. In order to establish uncontroverted facts for purposes of analyzing and ruling on Defendants' Motion for Summary Judgment, the Court has accepted Plaintiff's version of all disputed facts and drawn all justifiable inferences in favor of Plaintiff as the non-moving party. Accordingly, all objections to evidence are overruled.

(3) Unreasonable force claim as to on-scene defendants. The only unreasonable force asserted by Plaintiff involves the use of the dog. Plaintiff offers no facts to show that any on-scene officer except the dog handler, Blevins, was responsible for the use of the dog. Therefore, summary judgment is granted as to each on-scene defendant except Blevins.

CONTINUED

PROCEEDINGS CONTINUED:

(4) Unreasonable force claim as to the City of Riverside. Defendant City may be liable under Section 1983 if it (i) inadequately trains its police officers (City of Canton, Ohio v. Harris, 1090 S.Ct. 1197) or (ii) has a custom, policy or practice which inflicts injury (Monell v. Dept. of Soc. Serv. of City of N.Y., 98 S.Ct. 2018). Here, Officer Nessin testified that it would be inappropriate to use a dog "if the suspect isn't trying to flee, and it isn't assaulting the officers..." (Nessin tn., p.62). Plaintiff was "cornered" when the dog was sent in after him. Further, the police department's written policy is scant in terms of cautionary instructions or limitations (Nessin tn., pp. 62-71). Accordingly, genuine issues of material fact exist which may give rise to Monell/Canton liability, and summary judgment is denied as to Defendant City.

(5) Unreasonable force claim as to supervisory defendants.

--(i) Richardson. Richardson's Declaration states that he, as chief of police, had policy-making responsibility. Therefore, because the policy regarding use of dogs may violate the Fourth Amendment, summary judgment is denied as to Richardson. Hannon v. Black, 885 F.2d 642.

--(ii) Barnes, Figueroa, Heavon and Maumar. The Declarations of these defendants are uncontroverted. The facts establish that none of these defendants had policy-making responsibility. Therefore, summary judgment is granted in their favor.

CONTINUED

CIVIL MINUTES - GENERAL
- Continued

(4)

CASE NO. CV 92-532 -LHM( ) DATE: 9/18/93

TITLE: _____

PROCEEDINGS CONTINUED:

Count 2--Fourteenth Amendment

(4) Continued for Supplemental Briefing. The facts in Plaintiff's deposition could raise genuine issues of material fact regarding adequacy of medical treatment. However, Plaintiff does not identify any of the officials whom he claims were responsible for allowing his wounds to become infected. Further, Plaintiff offers no facts which show Monell liability on this claim. Nevertheless, Defendants have failed to identify correctly the portions of the pleadings and case file which would "demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 106 S.Ct. 2553. Accordingly, Defendants' Motion is continued and supplemental briefing is ordered per the schedule below on Plaintiff's Fourteenth Amendment claim in light of Duckhinon v. U.S., 838 F.2d 390, and Jones v. Johnson, 781 F.2d 769.

--10/5/93: Defendants supplemental brief to be filed and served.

--10/19/93: Plaintiff's response to be filed and served.

--10/26/93: Defendants' reply to be filed and served.

--11/8/93: Hearing at 1:30 p.m.
MSC at 2:00 p.m.

Settlement

(7) 10/16/93: Joint Settlement Report to be filed. The Court expects the parties to spend more than 35 minutes in settlement discussions before Judge Jones or other settlement referee in order to demonstrate compliance with Local Rules of good faith participation in settlement efforts.

COURTESY COPIES OF ALL DOCUMENTS MUST BE DELIVERED OR SENT BY FACSIMILE TO CHAMBERS OF JUDGE MCLAUGHLIN BY 12:00 NOON ON THE DATE DUE.

Page - 4

Supreme Court, U.S.
FILED
SEP 29 1995
CLERK

No. 95-404

In the Supreme Court of the United States

October Term, 1994

GEROLD A. SEBULSKY,
Petitioner,

vs.

LINFORD RICHARDSON, EDWARD BLEVINS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Linford Richardson, Edward Blevins

QUESTION PRESENTED

Are defendants entitled to the benefit of the qualified immunity as an immunity against suit based upon their decision in February, 1991 to deploy a police dog to apprehend a man who, while driving a stolen pickup truck, had engaged in a high speed, reckless police chase and who was believed to be armed and who was hiding in a densely vegetated area, refusing to heed loudly broadcast warnings to give himself up before a police dog would be used?

TOPICAL INDEX

Preliminary Statement 1

Statement of the Case 5

Statement of the Facts 6

Argument 9

THERE WAS NO CLEARLY ESTABLISHED LAW IN FEBRUARY 1991 THAT THE USE OF A POLICE DOG, UNDER THE FACTS AND CIRCUMSTANCES KNOWN TO DEFENDANTS AT THE TIME WAS OBJECTIVELY UNREASONABLE AND VIOLATED PLAINTIFF'S CONSTITUTIONAL RIGHTS. 9

Conclusion 19

TOPICAL INDEX

Preliminary Statement 1

Statement of the Case 5

Statement of the Facts 6

Argument 9

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Conclusion 18

TABLE OF AUTHORITIES

CASES

ANDERSON V. CREIGHTON, 483 U.S. 635, 107 S.CT. 3034, 97 L.ED.2D 523 (1987) — *2, 17*

CHEW V. GATES, 27 F.3D 1432 (9TH CIR. 1994) — *3*

FIKES V. CLEGHORN, 47 F.3D 1011 (9TH CIR. 1995) — *2, 5*

GRAHAM V. CONNOR, 490 U.S. 386, 109 S.CT. 1865, 104 L.ED.2D 443 (1989) — *10, 11*

HUNTER V. BRYANT, 502 U.S. 224, 116 S.CT. 534, 116 L.ED.2D 589 (1991) — *2*

MENDOZA V. BLOCK, 27 F.3D 1337 (9TH CIR. 1994). — *3, 11, 15, 16*

PEOPLE V. RIVERA, 8 CAL.APP.4TH 1000, 10 CAL.RPTR.2D 785 (1992) — *PASSIM*

POST V. CITY OF FORT LAUDERDALE, 7 F.3D 1552 (11TH CIR. 1993). — *17*

ROBINETTE V. BARNES, 854 F.2D 909 (6TH CIR. 1988) — *3, 11, 14*

WILSON V. MEEKS, 52 F.3D 1547 (10TH CIR. 1995) — *17*

In the Supreme Court of the United States

October Term, 1994

GEROLD A. SEBULSKY,
Petitioner,

VS.

LINFORD RICHARDSON, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Preliminary Statement

This petition for writ of certiorari seeks to undo decades of this Court's decisional law on the qualified immunity in federal civil rights actions. As this Court has held on innumerable occasions, police officers are immune from suit unless it can be said that no reasonable police officer would have believed their actions to be lawful, in

light of clearly established law and the facts and circumstances known to them at the time. *Hunter v. Bryant*, 502 U.S. 224, 116 S.Ct. 534, 116 L.Ed.2d 589 (1991); *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). "[T]he courts should ask whether the [officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter, supra*, 502 U.S. at 228.

This incident occurred in 1991. At the time, there was no clearly established law that the use of police dogs constitutes excessive force under the Fourth Amendment. To the contrary, even today, numerous courts have upheld the constitutionality of the use of police dogs under remarkably similar fact patterns. The release of police dogs to apprehend dangerous concealed suspects does not constitute "deadly force." *Fikes v. Cleghorn*, 47 F.3d 1011 (9th Cir. 1995); *Mendoza v. Block*, 27 F.3d 1337 (9th Cir.

1994); *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994); *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988); *People v. Rivera*, 8 Cal.App.4th 1000, 10 Cal.Rptr.2d 785 (1992).

Plaintiff's petition for writ of certiorari betrays political, not legal motivations. This is richly demonstrated by plaintiff's gratuitous claim that "police work is not significantly more dangerous than the average job." Petition at p. 10. Plaintiff also opines that "well-trained" police officers "rarely" use any force at all to apprehend a suspect, and that there is no "legitimate" need for police dogs as a form of reasonable force. *Id.* at 9.

Such advice is ill-taken from a convicted criminal, who understandably has little motivation to promote public safety since it may cost him his chosen livelihood. Plaintiff's expertise in effective police work is as suspect as he was on the night of the incident.

As to plaintiff's claim that police work is no more

dangerous than any ordinary job, Judge Trott perhaps said it most cogently:

> "The walls of law enforcement memorials across our nation are inscribed with the names of unsuspecting officers slain in routine traffic stops by persons like [plaintiff.] . . . . Ferreting out hiding criminals is a precarious task. . . . . When a real police officer is assaulted, real injury can occur. This is precisely why the police used trained dogs. The dogs can quickly find hiding criminals, and thankfully, they can do so without endangering the lives of the police officers for whom the dogs work." *Chew, supra,* at 27 F.3d at 1464-1465, Trott, J., concurring and dissenting.

Under these circumstances, plaintiff has not provided this Court with any grounds for certiorari. Officer Blevins

and Chief Richardson, like their counterparts in *Fikes, Chew, Mendoza* and *Robinette*, are entitled to the benefit of the qualified immunity.

Statement of the Case

Plaintiff Gerald Sebulsky filed a civil rights complaint for excessive force against nine individual defendants and the City of Riverside on January 27, 1992 arising out of an incident which occurred on February 4, 1991, while plaintiff, then on probation, was driving a stolen pickup truck. (CR 1.) Following a high speed vehicle pursuit, plaintiff, who was believed to be armed, hid in a bushy area and was captured only after the police deployed a police dog to locate him. Plaintiff heard the warning announcements, but ignored them.

Among others, plaintiff sued Police Chief Linford (Sonny) Richardson, who was the police chief for the City of Riverside, as well as officer Edward Blevins, the police dog

handler. (CR 1.)

Chief Richardson and Officer Blevins moved for summary judgment based upon the qualified immunity. (CR 66-69.) They filed an interlocutory appeal to the Ninth Circuit from the denial of their motion for summary judgment. (CR 87, 90.)

On February 3, 1995, the Ninth Circuit issued a memorandum opinion vacating the district court order and directing that summary judgment be granted. The decision, which was unanimous, was not certified for publication.

The decision did not finally dispose of this case. The City of Riverside remains as a defendant.

Statement of the Facts

The incident occurred while plaintiff was driving a stolen Mazda pickup truck at 2:00 in the morning. (ER 21:12-14, 22-24.) A local police officer, who believed plaintiff was driving under the influence, transporting a

stolen scooter and driving without any headlights, attempted to stop plaintiff by turning on his overhead lights and siren. (ER 24:16-25, 64 at ¶3.) Plaintiff admits that he fled cause he was on probation from a prior criminal sentence and would go to prison if apprehended. (ER 27:23-28:3.) A massive car chase ensued, with plaintiff recklessly driving the truck in speeds of 85 miles per hour, narrowly missing various deputies and innocent passers-by. (ER 26:24-25, 25:16-20; 54 at ¶¶4-5 and 64-65 at ¶¶3-4.)

Plaintiff intentionally crashed the truck into a tree and fled on foot into a densely vegetated area which was familiar to him. (ER 28:8-23; 30:8-31:11.) The police officers, believing plaintiff to be armed, requested that a police dog handler be sent to the scene. (ER 72 at ¶4.)

Officer Blevins unsuccessfully searched for plaintiff for about an hour with his police dog on a leash. (ER 72-73 at ¶4.) Numerous warnings were made by both individual

police officers and by an overhead helicopter that a police dog would be used if plaintiff did not come out of hiding. (ER 55 at ¶7; 72 at ¶4.) Plaintiff heard the announcements, but could not remember them, although he understood that the police were trying to communicate with him. (ER 32:7-34:2.) He refused to come out, and was found by a police dog, which grabbed him by the arm. (ER 38:17-24, 43:16-45:5.) Officer Blevins called off the dog as soon as he heard the dog locate plaintiff. (ER 45:6-10, 72-73 at ¶5.) Plaintiff was arrested for stealing the truck. (ER 55 at ¶9; 65 at ¶8.)

Chief Richardson was not involved in plaintiff's apprehension, arrest or detention. (ER 52 at ¶5.)

Argument

THERE WAS NO CLEARLY ESTABLISHED LAW IN FEBRUARY 1991 THAT THE USE OF A POLICE DOG, UNDER THE FACTS AND CIRCUMSTANCES KNOWN TO DEFENDANTS AT THE TIME WAS OBJECTIVELY UNREASONABLE AND VIOLATED PLAINTIFF'S CONSTITUTIONAL RIGHTS.

Plaintiff's brief runs far afield from the ante-bellum slaveholding South to the "superior orders" defense of the Nuremberg trials.

Plaintiff would have done better had he stuck more closely to the existing decisional law on the deployment of police dogs. Even the badly flawed opinion of the Ninth Circuit in *Chew v. Gates* recognized that the "use of police dogs to search for and apprehend fleeing or concealed suspects" was "long-standing, widespread, and well-known." 27 F.3d at 1447.

"No decision of which we are aware intimated

that a policy of using dogs to apprehend concealed suspects, even by biting and seizing them, was unlawful." *Ibid.*

"[W]hen the defendants implemented the policy at issue in this case, it was not clearly established either that police dogs constituted deadly force, or that the use of dogs to find, bite, and hold concealed suspects was unreasonable." *Id.* at 1449.

Both California and federal law permit police officers to use objectively reasonable force in making an arrest and to prevent an escape. Cal. Pen. Code §835; *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989).

Numerous judicial decisions, relying on *Graham* and California law, have held that the use of police dogs is an objectively reasonable use of force when employed against criminal suspects who deliberately secrete themselves rather

than voluntarily surrendering. *Rivera,* 8 Cal.App.4th 1000, 10 Cal.Rptr.2d 785 (1992) (use of police dog objectively reasonable when robbery suspect fled burglary scene and hid himself in bushes; unknown to officers whether suspect was armed); *Robinette, supra,* 854 F.2d 909 (use of police dog objectively reasonable to find burglary suspect hiding inside darkened building in the middle of the night); *Mendoza, supra,* 27 F.3d 1337 (use of police dog reasonable against suspect who fled bank robbery.)

Police officers are not required to act at their peril. Neither are they penalized for their objective reasonable decisions even though, in hindsight, they are incorrect or mistaken. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham, supra,* 490 U.S. at 396.

In *Rivera, supra,* 8 Cal.App.4th 1000, the suspect used a crowbar to attempt to rob an ATM which was located

near the Oakland Airport at about 4:00 a.m. Unknown to the suspect, the ATM was under surveillance by several police officers. After the suspect crashed his getaway car during a police pursuit, he jumped out of the car and fled through a marshy area. The police formed a perimeter. The suspects ignored a shouted command to stop. Ultimately, a police dog handler, who also was called to the scene, released his police dog and gave him the command to "search and bite". The suspect, who was unarmed, was found and bitten. In reviewing the suspect's motion to suppress, the Court of Appeal found that the use of force was reasonably related in scope to the circumstances. The *Rivera* court stated:

> "In the present case Officer Garrahan articulated a very good reason for using force--a reason not disputed by appellant: he reasonably believed appellant was armed, ***and he knew appellant was fleeing the scene of the crime.***

Officer Garrahan reasonably feared for his safety, and that of others in the area." Id. at 1005, emphasis added.

The Court of Appeal refused to require the police officers to refrain from using a law enforcement tool which would reduce their personal risk of harm against a suspect whose own criminal behavior had created the danger:

> "'Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.' [Citation.] With the escalation of drug-related violence, especially in large cities such as Oakland, their job is difficult and dangerous enough already. . . . . That is to say, society cannot in good conscience require those it employs to enforce its laws to choose between (1) placing their own lives in peril or

(2) ignoring their sworn duty to investigate apparent criminal activity.' [Citation.]" *Id.* at 1007-1008, emphasis added.

Rivera, if anything, is even less compelling than the facts before the jury. In *Rivera*, unlike here, the police did not make any prior announcements warning the suspect about their intent to release a police dog which might find and bite him.

In *Robinette, supra*, 854 F.2d 909, the Sixth Circuit held that a biting police dog could be constitutionally used to flush out a burglary suspect who was hiding in a dark building. Like here, the handler repeatedly shouted warnings before unleashing the police dog, but obtained no response. The suspect actually died of neck wounds received from the dog. Far from constituting "deadly force," *Robinette* recognized that police dogs actually prevented the use of deadly force, thereby enhancing the safety of the officers, bystanders and the suspect:

"Indeed, *instead of generally causing deadly force* to be used to apprehend criminals, we believe that these [police] dogs often can help prevent officers from having to resort to, or be subjected to, such [deadly] force. Any attempt to apprehend a criminal suspect presents the officer with a difficult and frightening situation, but certainly an attempt to arrest the suspect hidden inside an unfamiliar building during the night time presents a particularly confusing one. The use of dogs can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, *frequently enhancing the safety of the officers, bystanders and the suspect.*" *Id.* at 914, emphasis added.

And in *Mendoza, supra*, 27 F.3d 1337, the Ninth

Circuit unanimously affirmed a lower court decision that sheriff's deputies used objectively reasonable force in releasing a police dog to find a bank robbery suspect. *Mendoza* applied the same "use of force" analysis to police dogs as to other forms of physical restraint, such as use of a baton, or use of a gun. According to *Mendoza*, "'neither federal law nor California law clearly prohibits the training and/or use of police dogs to find, seize, and hold suspects, by biting if necessary.'" 27 F.3d at 1361.

As the Court of Appeal noted in *Rivera*: "it is a bit ironic for a suspect whose flight has necessitated the use of force to complain of it, when he could have avoided its employment by simply complying with the police command to halt." 8 Cal.App.4th at 1008

Plaintiff attempts to hold Officer Blevins and Chief Richardson civilly liable based upon his arguments about what the law should be, not what the law is now or what the law was in 1991. This is not the standard. "The contours of

the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." *Anderson, supra,* 483 U.S. at 640. "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Fort Lauderdale,* 7 F.3d 1552, 1557 (11th Cir. 1993).

In *Wilson v. Meeks,* 52 F.3d 1547, 1552 (10th Cir. 1995), the Court of Appeals emphasized the need for clear legal precedent "in a particularized sense" that the right is clearly established. Police officers should not be strictly liable for failing to predict legal trends:

> "One purpose of this ['clearly established'] requirement is notice; officials cannot 'reasonably be expected to anticipate subsequent legal developments' nor 'fairly be said to "know" that the law forbade conduct not previously identified as unlawful.'

[Citations.]"

Plaintiff has not met this burden here. He does not establish a "bright line" which either Chief Richardson or Officer Blevins has crossed. He has not cited a "clearly established" weight of authority which would put reasonable officers in the position of these defendants on notice against using a police dog to locate and find a suspect who was actively evading and resisting arrest, and who posed a threat to officer and bystander safety.

Conclusion

For the foregoing reasons, the petition for certiorari should be denied.

Dated: September 29, 1995

Respectfully submitted,

MANNING, MARDER & WOLFE,

By Robert S. Wolfe

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